51813 and 51814

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. ALBERT SANDERS and FOSTER SLAUGHTER, JR., Defendants-Appellants.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION. Honorable James J. Mejda, Judge Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The defendants, Albert Sanders and Foster Slaughter, Jr., were jointly indicted for the offenses of attempt murder, aggravated battery, and three counts of armed robbery. They were jointly tried by jury. The jury returned a guilty verdict against defendant Sanders as to aggravated battery and the three counts of armed robbery, but found him not guilty as to attempt murder. The jury returned a guilty verdict against defendant Slaughter, Jr. as to the three counts of armed robbery, but found him not guilty of aggravated battery and of attempt murder. After motions for a new trial and in arrest of judgment had been denied, judgments were entered on the verdicts. Defendant Sanders was sentenced to a term of four (4) to eight (8) years in the Illinois State Penitentiary on each convicted charge, the sentences to run concurrently. Defendant Slaughter, Jr. was sentenced to a term of three (3) to eight (8) years in the Illinois State Penitentiary on each convicted charge, his sentence also to run concurrently. Both defendants appeal. Their appeals have been consolidated.

This case involves a shooting incident arising from an argument occurring during a dice game. In the before-noon hours on November 12, 1965, in the second floor apartment of Garfield Starnes at 6718 South Clyde Avenue in Chicago, a dice game was in progress. The dice were being rolled on a bed in the bedroom

of this apartment. There were nine participants or observers at the time of the shooting; namely, Starnes, Lowell Smith, Robert Mitchell (a/k/a "Rooster"), Emanuel Winkfield, Charles Collier, Clinton Skipper, Freddie Bell (the person shot), and the two defendants, Albert Sanders and Foster Slaughter, Jr.

At the trial, Freddie Bell was the first witness called by the State. The defendants immediately objected and asked to be heard in chambers where it was brought to the court's attention that Bell, the victim of the shooting, would have to testify before the jury lying face down on a stretcher and speaking into a microphone placed near the floor. The defense asked that this witness for the State be withdrawn due to his inflammatory effect upon the jury. The State, in response, stated that Bell was a vital witness for them as he was the only person to possess competent testimony as to how he was allegedly shot in the back by defendant Sanders, while lying face down on the floor, a disputed fact in this case.

After returning to open court and having the jury leave for a moment, the court heard the attorneys for both sides question Bell, under oath, as to his present physical condition. The court then ruled that Bell was an essential witness and could testify lying face down on the stretcher. Such discretionary ruling is not an issue in this appeal. Some questions asked of Bell on direct examination and objected to are in issue however.

Bell testified before the jury that he was participating in the dice game when the defendant Slaughter complained that the dice were crooked. Immediately the other defendant, Sanders, exhibited a revolver and told everyone to get against the wall with their hands up. Lowell Smith and "Rooster" left the premises but the other men remained. Sanders then told Slaughter to search everyone. Slaughter took money from Bell and some of the oth

men in the room and he also took a loaded revolver which Starnes had in his pants pocket. Bell, pleading for the return of his money, was standing next to Sanders when he made a grab with both his hands for the gun in Sanders' hand, but was successful in getting only one of his hands on the weapon. Bell testified that something then came into contact with his head, either he hit his head on the nearby bedroom wall when lunging for the gun, or Sanders or Slaughter hit him on the head with their guns. He fell to the floor near Sanders, and there was a "little pause" before he was shot once in the back, in the spine. Both defendants fled.

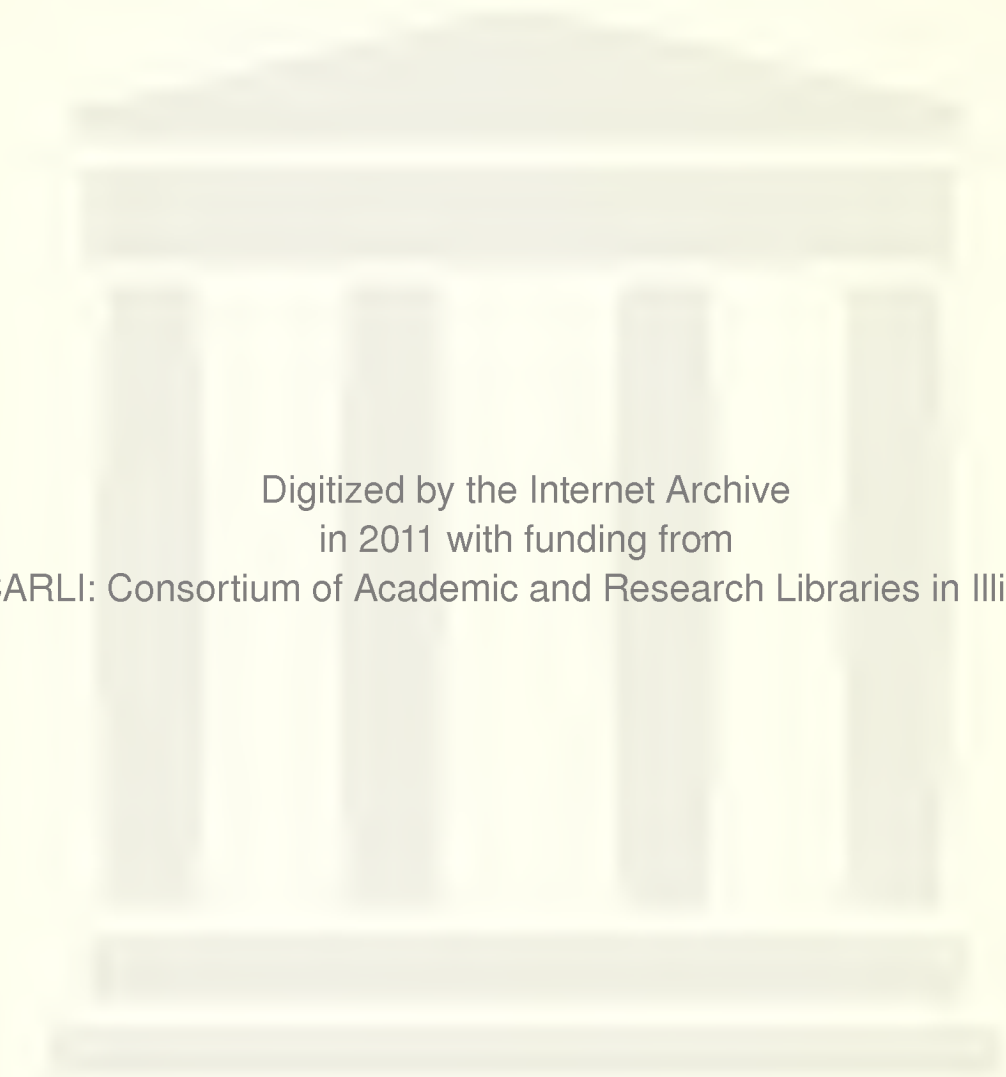
Bell went on to testify that he never saw any knives pulled at any time either before or after Sanders showed his revolver. He also stated that Garfield Starnes did not exhibit his weapon at any time that morning. On cross-examination, Bell testified that the "little pause" elapsing before he was shot in the back lasted about three or four seconds. Later, he said it lasted two or three seconds.

Such testimony was corroborated by the other witnesses for the State; namely, Starnes, Winkfield, Collier and Skipper. They all testified that the defendants were strangers to them and had been brought to the apartment by "Rooster." Continuing, they testified that Slaughter said the dice were crooked, Sanders immediately produced his revolver, and Slaughter searched them, taking any money he found and also a loaded revolver from Starnes. No one produced any knives during this commotion and Starnes never showed his revolver either. Some of them saw Bell fall to the floor due to some unknown cause and all, except Skipper, testified that two or three seconds elapsed from the time Bell fell to the floor to the time he was shot. None of them saw who shot Bell due to an obstruction to their view caused by a protruding portion of the bedroom wall. They were all in the bedroom

with Bell however at the time of the shooting. Skipper only heard the shot and did not see any of the events precipitating it. He was not asked anything on direct or cross-examination about the duration of the "little pause" elapsing between the time Bell fell to the floor and he was shot.

The only witness for the defense was the defendant Sanders. He testified that Slaughter said the dice were crooked whereupon Starnes showed his revolver and said there would be no argument or fighting in his house. There was a commotion as the men picked their money off the bed. Sanders said he then produced his revolver, as Collier now had a knife. Continuing, Sanders testified that he did not tell Slaughter to take any money from anyone, nor did he order anyone to do anything. After taking his winnings from the bed, he was leaving the room when Bell lunged at the weapon which Sanders was still holding, but which was not pointed in Bell's direction. Sanders pulled back, Bell fell, and the weapon discharged. There was no pause of two to four seconds between the time Bell fell and the weapon fired. On cross-examination, Sanders testified that in the ensuing commotion, after Slaughter had stated the dice were crooked, Bell and Collier pulled their knives causing Sanders to show his revolver, whereupon Starnes dropped his weapon on the bed after having produced it shortly before. The knives were dropped at this time also. In conclusion, Sanders stated that his weapon discharged as Bell tripped backward and fell.

"Rooster" was called by the State as a rebuttal witness. He testified that he had brought the defendants to the apartment for the dice game. During the game Slaughter said the dice were crooked,, whereupon Sanders drew his revolver. Starnes did not produce a weapon at any time "Rooster" was in the room, and he saw no knives exhibited. He fled along with Lowell Smith after Sanders drew his weapon. He did not see any shooting.



On appeal, the defendants contend they were denied a fair trial due to the following alleged prejudicial actions of the State's Attorney: (1) referring to the extent of Freddie Bell's injuries in both his direct examination and in rebuttal closing argument to the jury; (2) informing the jury in rebuttal closing argument, over objection, of the defendants' pre-trial motion to suppress evidence; (3) implying to the jury, in rebuttal closing argument, that the defendant who testified, Sanders, had a criminal record; (4) accusing, in rebuttal closing argument, the defense lawyers of manufacturing a defense of confusion; (5) interrupting defense counsel's closing argument to the jury and accusing him of lying. In response, the State contends these actions were proper in the circumstances or were not prejudicial or were "cured" of their alleged prejudicial effect by the prompt actions of the trial court.

The defendants' first contention is that they were denied a fair trial when the prosecutor, over objection, was permitted to ask Bell on direct examination how long he had stayed at Jackson Park Hospital, after he had been shot and where he was staying at time of trial. Furthermore, the contention is made that it was prejudicial error, although the defendants made no objection, for the prosecutor later to state in rebuttal closing argument:

> ". . . He (Bell) took the road that will bring him a life of misery, he reached out and tried to get the gun.
>
> * * *
>
> "I don't think that this is a very apt time to start talking idly about these two young boys (the defendants). There's a young man about two miles north of here, whose spine is severed and who is a cripple for life. I think that is a little more important when we consider what this case meant."

In support of this argument, the defendants cite People v. Nickolopoulos, 25 Ill.2d 451, 185 N.E.2d 209 (1962), in which the

defendant was indicted and convicted of assault with intent to commit murder. At that trial, evidence was introduced by the prosecution, over objection, concerning the extent of the victim's injuries as the victim himself testified that he was paralyzed in one leg and had seven holes in his intestines. The Illinois Supreme Court, in reversing and remanding the case, held that the introduction of such evidence was prejudicial, as the extent of injuries in a prosecution for assault with intent to commit murder is irrelevant. Malice, either express or implied, coupled with a criminal act is the gist of that offense.

The cited case and the instant case are distinguishable on their facts. In the case at bar, the extent of the victim's injuries is very much in issue because both defendants were indicted for aggravated battery, in addition to attempt murder and armed robbery. Under the Illinois Criminal Code, aggravated battery requires, inter alia, the infliction of great bodily harm or permanent disability to support a conviction. See Ill. Rev. Stat.(1965) ch.38, sec.12-4(a). The instant case involved a jury trial, and the jury was required to decide if the extent of the victim's injuries would support a guilty verdict for the offense of aggravated battery. The nature or seriousness of the injury inflicted was at issue and the trial court had no means of knowing upon which charge the jury would act. See People v. Doyle, 76 Ill.App.2d 302, 222 N.E.2d 205 (1966). Hence, it was proper for the prosecutor to present to the jury the facts as to how long the victim was in Jackson Park Hospital after the shooting (six weeks), and where he was recuperating at time of trial (Schwab Rehabilitation Hospital). The fact that immediately after Bell's testimony the extent of his injuries was stipulated to does not affect our judgment. His earlier testimony was properly before the jury.

Neither was it error for the prosecutor, in his rebuttal

closing argument to the jury, to comment upon the extent of Bell's injury. Such comment was based upon the evidence submitted to the jury in the case. Bell testified that he was shot just below his shoulder blades, in the spine. After his testimony, counsel for both sides entered into a stipulation that if Dr. Steider, M.D., were called to testify, he would state that he participated in surgery which was successful in removing a bullet from Bell's spinal canal. Furthermore, the effect of the entry of the bullet was a complete transection of Bell's spinal cord meaning he had no sensory or motor activity or perception below his ninth dorsal vertebra. Hence, the prosecutor's statements in rebuttal closing argument were proper conclusions based upon the evidence in the case. It is significant to note that this alleged error is raised for the first time on appeal, as no objection was interposed in the trial court.

Defendants' second contention is that prejudicial error occurred when the prosecutor informed the jury in rebuttal closing argument, over objection, of the defendants' pre-trial motion to suppress evidence. The evidence sought to be suppressed was the gun taken from Sanders' hotel room and the gun voluntarily surrendered by Slaughter's landlord. The defendants' motion to suppress was denied and hence the State could have introduced the weapons into evidence, but did not. Defense counsel commented upon this in closing argument, and in rebuttal, the prosecutor stated their introduction would have proved nothing. The prosecutor went on to say:

> "But the real reason we did not present them to you, and we have been asked to present them to you, is the fact that each of these defendants asked Judge Mejda not to let the State introduce this evidence because there was no search warrant."

The trial court immediately sustained the defendants' objection, ordered the remark stricken, and instructed the jury to disregard it. On appeal, the defendants now argue that such

remarks, although sought to be cured of their effect by immediate action by the trial court, were prejudicial because they made the defendants look to the jury as if they were hiding evidence and as though both defense lawyers had been hypocritical in their earlier closing argument to the jury. We do not agree with the State which contends on appeal that the defendants provoked this remark by first referring to the nonproduction of the weapons. Rather, the prosecutor was in error when he gave the jury the false impression that the defendants' motion to suppress had been granted and that was the reason for the State's failure to produce the two weapons. This error was immediately corrected, however, by the prompt action of the trial court as the jury was told to disregard the statement. Also, such error is not prejudicial error in this case as the evidence of the defendants' guilt is overwhelming. Four participants in the dice game corroborated Bell's testimony that he was shot once in the back and that only the defendants had drawn weapons. Their testimony remained unchanged through lengthy and vigorous cross-examination.

Furthermore, the record also contains repeated testimony by all the eyewitnesses indicating that defendant Slaughter took money from the persons of Bell and Collier in addition to taking money and a weapon from Starnes. He did this at Sanders direction after Sanders had drawn his weapon and told everyone to raise their hands and stand against the wall. Both defendants were indicted and tried for the armed robbery of these three men; Bell, Collier and Starnes. The record indicates that Slaughter was a willing participant in all the ensuing events, and was not so acting because Sanders compelled him to do so with the presence of his drawn revolver. The conviction of both defendants on the three counts of armed robbery is amply supported by the evidence. When errors complained of could not reasonably have affected the

result, the judgment should be affirmed. People v. Cardinelli, 297 Ill.116, 130 N.E.355 (1921).

Thirdly, defendants contend they were denied a fair trial when the prosecutor in his rebuttal closing argument to the jury allegedly implied that the defendant Sanders had a prior criminal record when he said:

> "Now, if we had asked the defense witness (Sanders) if he had ever been arrested before, that would be grounds for a mistrial, but the defense consisted of asking most of our witnesses that fact, and you found that none of them tried to hide anything, that Skipper and Rooster told you that they had each, once before -- or was it Collier and Rooster or Skipper and Rooster, I don't remember -- but each of them told you that on one prior occasion they had been arrested for gambling."

The defendants are correct when they assert that the credibility of a witness cannot be impeached on cross-examination by showing his prior arrests. Rather, a conviction of a prior infamous crime is the legal criterion for such impeachment and such conviction is provable only by the record. In referring to the possibility of defendant Sanders prior arrests however, the prosecutor was only replying to the cross-examination conducted by defense counsel who had asked Starnes, Skipper, Collier, and "Rooster," all State witnesses, if they had ever been arrested before for gambling. Moreover, when the prosecutor's entire statement is examined, it will be noted that he is not implying to the jury that the defendant Sanders, who testified, had a criminal record based upon prior arrests, but rather, he is drawing conclusions from the evidence presented to the jury and is seeking a final rehabilitation of the State's witnesses in the eyes of the jury. Significantly, defense counsel made no objection to such statement, but rather this contention is sought to be raised for the first time on appeal.

Next, the defendants contend prejudicial error occurred when the prosecutor, again in rebuttal closing argument, accused defense counsel of seeking to confuse the jury. The defendants

are correct in asserting that such argument many times serves only to antagonize the jury against the defendant and his attorney and does not aid it in weighing and evaluating the evidence. They cite this court to five cases in which a reviewing court reversed and remanded a proceeding due to such comments. However, analysis of these cases indicates that two of them involved, by the reviewing court's own statement, a very close question of criminal guilt. Hence, the prosecutor's closing argument to the jury could very easily have tipped the scales of justice. The other three cases involved prejudicial remarks by the prosecutor in closing argument coupled with such other errors as the commission of unrelated other crimes, committed by the defendant being admitted into evidence. In the instant case, the defendants' guilt is supported by overwhelming evidence and any errors of the prosecution were immediately "cured" by the prompt actions of the trial court. Furthermore, defense counsel did not object to such remark when made by the prosecutor. Hence, the point is waived on appeal. See People v. Switalski, 394 Ill. 530, 69 N.E.2d 315 (1946) and People v. Conrad, 81 Ill.App.2d 34, 225 N.E.2d 713 (1967).

In conclusion, defendants argue they were prejudiced when the State's Attorney interrupted defense counsel's closing argument and accused him of lying. The record indicates that immediately thereafter a conference was held in chambers in response to defendants' motion for a mistrial. The prosecutor apologized to defense counsel in chambers and agreed to apologize also in front of the jury. Defense counsel indicated that with this apology, he would then like to proceed. The parties returned to open court where the prosecutor expressly apologized to the jury and to defense counsel, who publicly accepted the apology. The court also instructed the jury to disregard the prior statement which indicated that defense counsel was not telling the

truth. Continuing, the court indicated that the utterance should have no bearing on the jury's deliberation of the issues involved, since remarks of counsel in closing argument are not evidence. The court ended its discussion by stating counsel had been admonished and had apologized.

In support of their contention that they were prejudiced by this statement, defendants cite the case of People v. Savage, 325 Ill. 313 (1927), which involves an armed robbery. The prosecution's sole witness was the female victim who was robbed in an unlighted alley at approximately midnight. She identified the defendant as the wrongdoer, but he had many alibi witnesses and the other items of physical evidence in the case corroborated his innocence. The Illinois Supreme Court reversed and remanded the proceedings due to three prejudicial errors in the record, one of which concerned the prosecutor informing the jury that defense counsel had lied to them in his closing argument. The opinion, however, does not indicate that the prosecutor apologized to defense counsel before the jury in open court or that the court informed the jury to disregard the statement, both of which occurred in the instant case. Furthermore, in the case at bar, defense counsel accepted the prosecutor's public apology and did so in open court. On appeal, defendants argue this prompt action by the trial court did not cure the error. However, we find that the spontaneous remark made by the State's Attorney was cured of its offensiveness by his subsequent apology before the jury, the instruction by the court to the jury to disregard the spontaneous utterance, and defense counsel's public acceptance of the prosecutor's apology.

For the foregoing reasons, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and MC NAMARA, J., concur.

No. 51880

In The

APPELLATE COURT OF ILLINOIS

First Judicial District

A. D. 1968.

WILLIE SMALL, Plaintiff-Appellant, vs. JOHN M. BASTIAN, Defendant-Appellee.	Appeal from the Circuit Court of Cook County, Illinois Honorable David Lefkovits, Judge Presiding.

ALLOY, P. J.

This cause originated, as an action to recover damages for bodily injuries suffered by plaintiff Willie Small, as the result of an automobile collision between the motor vehicle being driven by him and that of the defendant, John M. Bastian, on July 23, 1958. The vehicle driven by defendant, John M. Bastian ran into the rear of the truck driven by plaintiff. The action was first instituted in the Municipal Court of Chicago on July 22, 1960, and sought damages in the sum of $10,000 for personal injuries. The case was thereafter transferred to the Circuit Court of Cook County since the accident did not occur within the city limits of the City of Chicago. Plaintiff was thereafter granted leave to amend the complaint and he amended the Ad damnum to request damages in the sum of $30,000.

In January, 1966, plaintiff requested an order requiring defendant to produce for his inspection, twelve certain photographs of the accident. The order was granted and plaintiff received the photographs. At the time of trial, defendant, by motion, requested that plaintiff's complaint be dismissed because the photographs were not returned. Plaintiff's attorney asserted to the court that the photographs had been returned to defendant and defendant's motion was, therefore, denied. The trial began on September 12, 1966, before a jury. The attorney for defendant moved at that time for a continuance from September 12, 1966, to September 16, 1966, because defendant was outside of the City of Chicago. Such request was denied since the court asserted it was not presented in timely fashion. There was comparatively little evidence on the question of liability and at the close of the evidence the court directed a verdict in favor of plaintiff and as against defendant on the question of liability only and the cause was submitted to the jury for the purpose of determining damages. Defendant actually concurred in and agreed to this finding on the issue of liability.

The evidence in the record as to damages disclosed that plaintiff was a 46-year old common laborer who drove a truck and lifted concrete forms for a cement contractor. He testified that prior to the accident he was in good health and that after the accident a knot developed on his left wrist,and also his neck, back and shoulder pained him. He also testified that he was dizzy and had headaches. After the accident,he had been given first aid at a hospital. He was treated at the hospital clinic for about six weeks and then referred to a Dr. Reiffel because of the knot on his wrist, and the pain in his back, arms and his headaches. The

doctor prescribed a back brace which he wore from the time of the accident until the trial, for a period of 8 years. The brace which he wore at the time of the trial was the third brace, as he had worn out the two previous braces. At the time of trial, plaintiff testified that his left wrist still had not healed and that it bothered him and was weaker. He testified that if he does a lot of lifting the knot reappears. He also testified that his back bothered him often and "keeps hurting all the time." On cross-examination he was asked the following question: "I take it, your complaint of headache, or headaches that you have as a result of this accident have all cleared up?" Plaintiff responded: "Every once in awhile it bothers me." The attorney then questioned: "Nothing serious?" And plaintiff answered: "I got to learn to live with it." The evidence also disclosed that plaintiff had only a third grade education.

There was evidence to show that the records of the hospital where plaintiff had been treated were not available and probably had been destroyed, and also that the doctor who had originally treated the plaintiff at the clinic had left the clinic and his address was not known. Dr. Reiffel, however, testified that he examined the plaintiff on August 1, 1958, and diagnosed the injuries as a trauma to the skull complicated by a degree of cerebral concussion, trauma to the left shoulder complicated by the subdeltoid bursitis and trauma to the lumbar spine and disc injury resulted in sciatic nerve involvement of the lower extremities. There were no fractures or dislocations. The doctor also testified as to the existence of a knot on the tendon of his wrist due to trauma. Following trial of the cause the jury returned a verdict in the sum of $20,000 and judgment was entered on the verdict.

Defendant filed a post-trial motion requesting that the judgment be set aside or, judgment entered for defendant(in the alternative, for a new trial). Following argument on this motion the trial judge entered an order granting a remittitur in the amount of $15,000 which reduced the judgment to $5,000. This preliminary order was thereafter modified on the same day, and an order entered, in which the trial court stated that the jury verdict in the sum of $20,000 was in the opinion of the court excessive. The court thereupon granted defendant a remittitur in the sum of $15,000 with the judgment to be reduced to the sum of $5,000 and costs "or in the alternative if plaintiff fails to accept remittitur, then defendant is granted a new trial on assessment of damages only."

The questions to be determined on review of this cause are whether the trial judge abused his discretion in entering the order requiring a remittitur to $5,000 with the alternative of a new trial on the issue of damages only. Secondary questions which are raised are whether the trial judge abused his discretion in refusing to grant defendant a continuance of four days after the trial had begun and the jury was selected, and also whether the trial judge abused his discretion in refusing to dismiss plaintiff's complaint because of plaintiff's alleged failure to return defendant's photographs. We should observe at this point that the trial judge, in directing the verdict for plaintiff on the question of liability, was following the desires of both parties to the cause (since defendant sought to admit liability and did not object to the motion for a directed verdict on the issue of liability).

On the question of the continuance which was requested by motion after the jury had been selected, it is apparent that the court could hardly have abused its discretion since the case was already

underway at the time the motion was made and attorney for defendant should have known before the case was actually begun that defendant was not in town. Since the motion was made at such time, we cannot find that there was an abuse of discretion by the trial judge in refusing to grant the continuance.

As we have indicated in this opinion, defendant had contended that the photographs which were given to plaintiff under court order were not returned to him. Plaintiff asserts that such photographs were returned. Since the motion for dismissal was made after the trial had begun and the jury was selected, the trial judge was obviously justified in refusing to dismiss the complaint on such motion made by defendant.

While there were some questions raised with respect to the respective orders entered by the court on October 14, 1966, with relation to the remittitur, it is not necessary that we discuss these questions in view of our determination of this cause. The basic question before us is whether the trial judge abused his discretion in entering an order for a $15,000 remittitur with new trial imposed as an alternative in the event of failure of plaintiff to accept such remittitur. While a trial judge has broad discretion in ruling on questions of new trial, courts of review have constantly asserted that a judge should not substitute his opinion for that of the jury. As stated in KAHN v. JAMES BURTON CO., 5 Ill. 2d 614, at 623:

> "Under our system of jurisprudence, jury determinations can be set aside only when a court of review, or a trial court upon proper motion, is clearly satisfied that they were occasioned by passion or prejudice or found to be wholly unwarranted from the manifest weight of the evidence. We think the trial court properly overruled defendant's motion for judgment . . . "

The principle referred to in the KAHN case is basic to the function of a judge in ruling on motions attacking jury verdicts (DALLAS v. GRANITE CITY STEEL CO., 64 Ill. App. 2d 409, 427).

It cannot be stated specifically what elements would make a verdict excessive. As stated in MYERS v. NELSON, 42 Ill. App. 2d 475, 481:

> "There is no precise rule by which an award of damages can be fixed in an action for personal injuries because compensation for them does not lend itself to mathematical computation. The rule is that a verdict for personal injuries will not be disturbed by a reviewing court unless so palpably excessive as to indicate the jury acted from some improper motive. Lester v. Hennessey, 29 Ill. App. 2d 11, 172 NE2d 403. The question before us is whether or not the amount of the verdict falls within the necessarily flexible limits of fair and reasonable compensation or is so large as to shock the judicial conscience. Barango v. Hedstrom Coal Co., 12 Ill. App. 2d 118, 138 NE2d 829."

Applying these principles to the cause before us it is difficult to justify the remittitur ordered in the present case. It is not a question of what we or the trial judge individually would have allowed as damages. As we have stated in IZZO v. ZERA, 57 Ill. App. 2d 263, 267-8:

> "We have frequently observed that when a jury passes upon questions of fact, its findings will not be set aside as being against the manifest weight of the evidence unless it appears that such findings are clearly or palpably against and contrary to the manifest weight of the evidence. . . A verdict cannot be said to be against the manifest weight of the evidence unless an opposite conclusion is clearly evident. . . In considering the motion made in the trial court for judgment notwithstanding the verdict and for new trial, the trial judge was confronted with these considerations likewise."

Nothing in the cause before us indicates that there was any inference of passion or prejudice. The plaintiff had worn a back brace for a period of 8 years as a result of the accident. On the basis of the record, while we ourselves might not have made an award in such amount, it cannot be stated that the verdict of $20,000 was contrary to the manifest weight of the evidence, and we, therefore, must conclude that the trial court erred in ordering the remittitur.

The judgment of the Circuit Court of Cook County will, therefore, be reversed with directions to the trial court to vacate the order directing the remittitur and to reinstate the judgment of $20,000 originally entered in this cause.

Reversed and Remanded with Directions.

Stouder, J. and Culbertson, J. concur.

No. 67-101

In The

APPELLATE COURT OF ILLINOIS

Third District

Abstract

BYRON R. YANDERS, Plaintiff-Appellee, vs. LEE CLINE, Defendant-Appellant.	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Iroquois County, Watseka, Illinois Honorable Robert F. Goodyear Presiding Judge

SCHEINEMAN, J.

The plaintiff, Byron R. Yanders, was employed by the defendant, Lee Cline, to operate some farm machinery in the process of elevating the corn into cribs. The machinery was powered by a tractor with its wheels on rollers that turned some shafting. The shafts operated an elevator and a lift which raised the front end of a wagon to assist in causing the corn to slide into the hopper. Some corn would be spilled on the ground, and the plaintiff would then pick it up with a scoop or by hand to put it in the hopper.

The defendant had warned the plaintiff the spinning shafts were dangerous, and instructed him to turn off the power to stop them before approaching the shafts to pick up spilled corn.

The plaintiff followed instructions but eventually, after he had turned off the power and picked up spilled corn, he turned it on again, then walked from the tractor to the wagon. In passing, he noticed a single ear of corn about six inches from the rotating shaft. He stopped to pick it up. He testified that his hand was six inches from the shaft. Although he was wearing safety clothing that had no buttons or cuffs, his sleeve got caught and he was pulled into the spinning shaft and suffered severe injuries.

A jury returned a verdict for the plaintiff and answered special interrogatories in his favor. The court entered judgment on the verdict and this appeal followed.

The defendant-appellant asserts that the plaintiff was negligent and failed to exercise ordinary care, also that he assumed the risk of his employment. It is further asserted that the jury was not properly instructed.

It was brought out in testimony that the main shaft was in two parts, one part telescoped into the other, so that the total length of the shaft could be adjusted by sliding the smaller part in or out of the larger. When the machinery was moved to another location the length could get out of adjustment. Since the wagons in use were of the same size, it became desirable to mark the juncture on the shaft so that it could easily be reset to the correct length. This the defendant did by wrapping a piece of baling wire around the inner rod at the juncture. After the equipment was moved, the length

of the shaft was adjusted as indicated by this piece of wire, and then the wire was removed. Whether the defendant did remove the wire or neglected to do so on the day of the injury, is in dispute.

There was another small piece of wire of the shape of a hair pin, which was imbedded in the knuckle joint at the end of the shaft to hold the parts together.

When the plaintiff was caught, he was knocked unconscious, suffered a broken arm, other cuts and contusions and all of his clothing was torn off and later found wrapped tightly around the shaft. In spite of his injuries, the plaintiff managed to get into the house and don a pair of pants. He then got the attention of the defendant who took him to a hospital.

At the trial the defendant was questioned several times about the piece of wire around the shaft. He told of his customary practice of marking with a piece of wire which, he said, had always been removed after the machines were set up at the new location. On all but one reference to this he was quite positive. He would say "I specifically recall that I removed that wire." Or words to that effect. The one exception was modified by the answer, "I am pretty sure I removed the wire on that occasion." This may have had reference to moving the machinery at some other time rather than just prior to the injuries. Thereafter, the witness repeated his positive statement that he knew that he had removed the wire.

The plaintiff testified he had not seen any wire on the spinning shaft. If he had seen it, he would not have got caught.

However, he was positive that his hand was about six inches from the shaft when he was caught and that it occurred at the juncture of the shafts. If this testimony is accepted as true, it is difficult to account for his safety clothing being dragged by the shaft unless there was a piece of wire extending from it. When the doctor who treated plaintiff was on the witness stand he was asked about any conversations with the defendant. He testified that at the hospital the defendant explained that the plaintiff was injured when he had been caught in some wire on the tumbling rod and he added that he should not have had the wire on it.

The defendant was on the stand later and in effect denied this conversation with the doctor. He asserted he had no conversation with the doctor except the next day when he was asked about taking Mr. Yander's arm off. He also said, "I don't think I told him that I shouldn't have put the wire on it. I don't remember saying anything like that." His denials of talking about the wire are weakened by his further assertion that he was talking about wire but referred to the hair pin. The hair pin would be several feet from the place where the shafts telescoped together which the plaintiff testified was the location opposite his hand when he was caught.

The defense argues that the way plaintiff's clothing was wrapped around the knuckle end of the shaft indicates he is mistaken as to the location of his hand. Whether the plaintiff's testimony or the defendant's arguments has greater weight would be a question for the jury.

Naturally, the defense attaches greater weight to the testimony of the defendant than to that of the doctor who purported to recite the substance of a conversation that took place five years before. Of course, the lapse of time was the same for the defendant. And the argument that the defendant could not have talked about this wire because he did not examine the machinery until the next day does not impress. That does not mean that he knew nothing about the wire on the day of the injury. While he was driving to the hospital with an injured man by his side in pain, he may have momentarily recalled that he had not removed the wire on this occasion, a memory subsequently suppressed. And the fact that the plaintiff did not see a loose end of wire spinning with the shaft obviously did not convince the jury the wire did not exist.

Our comments on the evidence are not for the purpose of deciding the factual issues in the case. But we believe they show sufficient divergence to present a jury question.

The defense relies heavily upon FERGUSON v. LOUNSBERRY, 58 Ill. App. 2d 456, which held that a verdict should have been directed for the defendant on the facts in that case. The same opinion recognized the function of the jury where there existed conflicting or divergent testimony and the reasonable inferences and implications therefrom. FERGUSON v. LOUNSBERRY, 28 Ill. App. 2d 456, 461. This opinion also noted that the plaintiff in that case had extensive experience with the operation he was performing, a fact not present in the case at bar.

Since this injury occured in the process of farm work, the doctrine of assumed risk still exists. However, it is not necessary in this case to analyze a distinction between assumed risk and contributory negligence, both depend largely upon the injured party's knowledge.

Thus if he had sufficient knowledge of conditions, he may be guilty of contributory negligence in taking obviously dangerous chances. But if he does not know of a danger, he does not assume the risk thereof. CLARK v. C.R.& P. CO., 231 Ill. 548; 83 N. E. 286; WHEELER v. CHICAGO & W.I.R.CO. 267 Ill. 306, 108 NE 330; 38 Am. Jur. Negligence, Secs. 171, 172 and 182; DECKERT v. V.C.& N.I.R.R. CO., 4 Ill. App. 2d 483, 124 N.E. 2d 372; HARGISS v. STANDARD OIL CO. 10 Ill. App. 2d 119, 134 NE 2d 518.

Since the plaintiff was not shown to know of the piece of wire, there is no evidentiary basis to charge him with the knowledge of the special danger inherent in its presence. Hence the jury could properly find he did not assume that risk and was not negligent.

With respect to objections made to jury instructions, we observe that the defense objected to the giving of certain IPI instructions which were in fact mere definitions of words used in other instructions. The forms objected to were IPI No. 10.01, No. 10.02 and No. 15.01 (pocket parts). Lawyers may disagree as to the meaning of words, but the forms used here were applicable and are the required forms.

Defendant's refused instructions were special drafts not in IPI. His No. 6 was covered by a given instruction IPI No. 10.03. His Nos. 7 and 8 selected some item of evidence for the court to comment upon which is not recommended. We find no errors in the court's rulings on instructions.

We conclude the trial court properly submitted this case to the jury and the judgment on the verdict is affirmed.

Judgment Affirmed.

Alloy, J., Stouder, J. concur.

No. 51643

96 I.A. 2-238

THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, a municipal corporation, Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
v.	)	HON. DONALD J. O'BRIEN.
TIM, INC., an Illinois corporation, Defendant-Appellee.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The Metropolitan Sanitary District of Greater Chicago brought this suit against Tim, Inc., lessee of a tract of Sanitary District property located along the Sanitary and Ship Canal. The District sought to recover the proceeds received by the defendant from the sale of a mound of soil and gravel located on the leased premises. The complaint was dismissed and the District appeals.

During the construction of the sanitary ship canal, soil, gravel and rocks were dredged from the channel and deposited along the banks. The mound of material thus created, which is the subject of this suit, is referred to as a "spoil bank." In the spring of 1964 the lessee entered into an agreement with KLMP, a joint venture group, which undertook to remove and sell the spoil bank for use as a land fill in the construction of highways. Plaintiff learned of the agreement and objected on the ground that the spoil bank belonged exclusively to it. On April 24, 1964, plaintiff and the defendant entered into an escrow agreement by which it was stipulated that the defendant should deposit in the escrow account all the proceeds derived by it from the sale of the

spoil removed from the premises and that the sum so deposited should be held until a final judgment of a court of competent jurisdiction had been entered determining the ownership of the spoil bank. This suit was brought for that purpose.

The District had also entered into a similar agreement with another lessee with regard to the sale of a spoil bank situated on another tract of District property. A suit in that companion case which involved the same issues as those in the instant case has been resolved in favor of the District, Metropolitan Sanitary District of Greater Chicago v. Rieck, 88 Ill. App. 2d 38, 232 N.E.2d 182 (leave to appeal denied, 39 Ill. 2d 267). In that case the court held that the spoil bank was realty (citing Sanitary District v. Young, 285 Ill. 423, 120 N.E.826); that the agreement between the parties was a lease and not a sale; and that the lessee was not entitled to dispose of the property. That case is conclusive as to the issues here involved and the judgment of the trial court must be reversed and the cause remanded with instructions to enter judgment in favor of the plaintiff.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH INSTRUCTIONS.

DEMPSEY, P.J. and SULLIVAN, J. concur.

No. 67-101

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DOROTHY S. GUSHLEFF, Plaintiff-Appellee, vs. THOMAS L. GUSHLEFF, Defendant-Appellant.	Appeal from the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. ——— Honorable I. H. Streeper, Judge Presiding.

HANNAH, J.

This is an appeal from the denial of defendant-appellant's motion to amend a decree of divorce, by a nunc pro tunc order, which in effect would construe and reform a stipulation for property settlement made and entered into between the plaintiff and defendant as a part of the divorce proceedings.

The case, according to defendant's statement in his brief, purports to be a case initiated under Section 72 of Chapter 110, Civil Practice Act, to modify a decree, or to reform a purported property settlement. From the testimony offered in the instant case, it appears a written stipulation was signed by both parties. But at no place in the record is the stipulation set forth. It is not made a part of the decree, nor does the decree set forth its terms. The pleadings not being incorporated in the record, we are unable to determine the respective claims of the parties, except as disclosed by defendant's motion.

As nearly as we can determine from the record, this decree was entered slightly over one year prior to the filing of the motion now before the Court. Some time prior to September 22, 1964, a complaint for divorce was filed by Dorothy S. Gushleff against Thomas L. Gushleff, who filed an answer thereto. What was alleged in the complaint and answer as to the property rights of the parties is not disclosed, since the pleadings are not included in the transcript. According to the judge's

docket entry, a hearing was had on September 22, 1964, both parties being represented by counsel, and evidence was presented. A decree of divorce was granted, and the following docket entry was made: "Property settlement agreement identified and admitted in evidence--property settlement approved". The decree itself recites:

> ". . . . this cause comes on to be heard on the complaint of the plaintiff, the defendant's answer thereto, and it appearing to the Court that the plaintiff is represented by Ralph T. Smith and the defendant is represented by Morris B. Chapman, and that both parties are present in open court or represented by counsel, consenting to an immediate hearing, without notice; and the Court finds that the defendant has been guilty of extreme and repeated cruelty as charged in the complaint.
>
> "And the Court further finds that the parties have entered into a stipulation with regard to their respective property rights which is fair and equitable and should be approved by the court.
>
> "It is therefore ordered, adjudged and decreed as follows: That the marriage between the plaintiff and defendant is dissolved and each freed from the obligations thereof; that the stipulation entered into between the parties with regard to their property rights is hereby approved, and the parties are each respectively ordered to do that to which they have agreed in said stipulation. . . . . ."

The only pertinent matters presented are, (1) the divorce decree, (2) the defendant's motion, (3) a note and mortgage in the amount of $27,750.00 payable to the defendant and plaintiff as joint tenants, out of which the dispute arises, and (4) the testimony of three witnesses, regarding preliminary negotiations concerning a property settlement at the time of the divorce.

The dispute finds its origin in an alleged claim made by Dorothy S. Gushleff, plaintiff-appellee, for an interest, as joint tenant, in and to the aforesaid note and mortgage. This the defendant denies upon the basis of the stipulation entered into between the parties regarding their property rights and approved in the divorce decree. Defendant claims the stipulation through error failed to exclude the plaintiff of an interest in this note and mortgage, but in his motion exonerates his counsel and plaintiff's counsel of any fault, negligence or fraud. The only finding made by the Court was that the stipulation was "fair and equitable and should be approved by the Court". It was ordered approved and the parties "respectively ordered to do that to which they have agreed in said stipulation".

Defendant-appellant by his motion "moves the Court to enter an order nunc pro tunc in this cause to have the decree and stipulation herein speak what was intended by the parties". In support of the motion the defendant alleges, in substance, that the reason said note and mortgage included plaintiff as payee was because she was, at that time, his wife; that the note and mortgage were given in payment for a certain sale and purchase of defendant's partnership interest in a Pepsi Cola business and certain real estate sold by defendant to the makers of the note and mortgage. Defendant alleges that he had inherited or purchased this property from his father, and that plaintiff had no actual interest therein other than that arising out of the marriage relation.

Defendant further alleges that in the divorce proceedings, subsequently had, he and his then wife entered into the stipulation for property settlement hereinbefore referred to. He alleges that the disposition of plaintiff's interest in any properties of the defendant "was discussed" that "it would be disposed of by her receiving $6,500.00 and the receipt of a refrigerator and television and her personal belongings".

It appears there were some conferences between the parties and between the parties and their counsel relative to a property settlement. Plaintiff's attorney wrote a letter to defendant's counsel preceding the divorce, stating that he understood the agreement to be that he (defendant) "has agreed to pay her the sum of $6,500.00 in cash as a property settlement. In return she is to relinquish any claim she has in either their home or their business". This letter made no comment about the note and mortgage, nor to personal property. He requested defendant's counsel to prepare the agreement, which he did in conjunction with his client, the defendant. Plaintiff's counsel had nothing to do with its preparation.

To lend clarity to this case, we must first explain the background leading to this proceeding. It seems that long before this divorce suit was instituted, in October, 1963, the defendant was a member of a partnership composed of the defendant, his brother and sister, William Gushleff and Irene Gushleff Nelson, owning and operating the Gushleff Distributing Company. It also appears that Thomas Gushleff

and others owned an interest in certain real estate. On October 9, 1963, the partnership was dissolved by written agreement. Dorothy Gushleff, plaintiff, was not a member of that partnership. On October 12, 1963, Thomas Gushleff and Irene Nelson by written contract sold their interest in the partnership to William Gushleff. Dorothy Gushleff, (plaintiff here) was not a party to that contract.

On the same day, October 12, 1963, Thomas Gushleff and his wife, Dorothy Gushleff, plaintiff, together with others (not material to this case) by written contract sold to William Gushleff and his wife, Pauline, their interest in certain real estate. On the same day of all these transactions, October 12, 1963, to secure the payment of $27,750.00, the consideration for the foregoing purchases, William Gushleff and wife Pauline executed their installment promissory note in said amount payable "to the order of Thomas Gushleff and Dorothy Gushleff not as tenants in common, but as joint tenants, with full right of survivorship". To secure this note they also executed a mortgage upon certain real estate, said mortgage running to "Thomas Gushleff and Dorothy Gushleff, husband and wife, ..., not as tenants in common, but as joint tenants, with full right of survivorship".

Later, but sometime prior to September 22, 1964, Dorothy Gushleff filed her divorce suit, and on September 22, 1964, the decree of divorce approving the stipulation as to property settlement was entered. Subsequently, though the date does not appear, Dorothy Gushleff asserted a claim to an interest in the foregoing note and mortgage. This present suit is the aftermath of that asserted claim. The defendant-appellant claims in his motion that the stipulation was intended as a full and complete property settlement excluding all interest of the plaintiff in and to any property other than a cash settlement of $6,500.00 and certain personal property. We gather from the testimony that $6,500.00 was paid and certain personal property given to plaintiff.

On October 5, 1965, slightly over one year after the entry of the decree for divorce, the defendant filed the motion now before the Court. The motion alleges that the payment by defendant to plaintiff the sum of $6,500.00 plus giving her

certain personal property was to be in full of all her interest. In support thereof it is alleged that said note and mortgage were made payable to him and Dorothy Gushleff because she was his wife, and that she in fact had no interest in the business and property sold, but the banker who made the loan insisted upon it being so made. Defendant says, "That through inadvertence, and not through any endeavor on the part of the plaintiff's attorney, nor on defendant's, the parties failed to provide for the assignment of any interest of the said plaintiff in and to the note and mortgage aforesaid, although it was the intention and contemplation of all the parties at that time that this should be". He also alleges that "the defendant was not negligent in any wise in failing to provide for the specific entry of the matters aforesaid but relied upon plaintiff's counsel, who inadvertently failed to do so". But this is not true since it is admitted defendant's counsel, not plaintiff's, prepared the stipulation at defendant's direction, and that defendant had the note and mortgage in his possession for a year prior to this time. He then prays the Court to amend the decree decreeing that plaintiff has no interest of any kind or nature in the note and mortgage.

Defendant later sought to file an amendment to the motion which was denied. The amendment set up no new material that was not brought out in the evidence, and so its denial worked no prejudice to the defendant.

As heretofore pointed out, the relief here sought is the modification of a decree for divorce by the Court's modification or reformation of a contract in the form of a stipulation relative to a property settlement. However, the Court would observe that all the contracts which apparently formed the background of the stipulation were before the Court and counsel at the time the stipulation was approved. They were all offered in evidence according to the docket entry, and they disclosed the form and contents of the note and mortgage. Neither the plaintiff nor her counsel had anything to do with the preparation of the stipulation. Plaintiff signed it at the request of her counsel. Defendant's motion expressly exonerates plaintiff's counsel and his own counsel from any negligence or fault in the preparation of the stipulation.

There is no evidence of fraud, concealment or mistake upon the part of the

parties. All prior or contemporaneous verbal conversations relating to the subject matter are presumed merged into the writing.

After the expiration of thirty days, following the entry of a decree, it becomes final and the court loses jurisdiction to vacate or modify it. Coolbaugh v. Coolbaugh, 33 Ill. App. 2d 444. After such lapse of time it is presumed that the proof was adequate to support it, and it cannot be collaterally attacked. People v. O'Keefe, 18 Ill. 2d 386; McDonald v. Neale, 35 Ill. App. 2d 140. Defendant fails to make a case entitling him to relief under Section 72 of the Civil Practice Act. Anderson v. Anderson, 4 Ill. App. 2d 330.

For the reasons herein set forth, the defendant must be denied the relief he seeks, and the order of the Circuit Court denying defendant's motion is affirmed.

Judgment affirmed.

CONCUR: /S/ Edward C. Eberspacher

CONCUR: /S/ Joseph H. Goldenhersh

Publish Abstract Only.

51040

901 I.A. 2 314

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY,
	)	CRIMINAL DIVISION.
vs.	)	
	)	
GEORGE C. CULVER,	)	Honorable Thomas H. Fitzgerald,
	)	Judge Presiding.
Defendant-Appellant.	)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The instant defendant, George C. Culver, Donald Baranowski and Phillip Foster were jointly indicted for the armed robbery of one Roman Kosinski, the proprietor of a jewelry store located at 5754 West Belmont Avenue in the City of Chicago. Co-indictees, Baranowski and Foster, following their arrest, confessed to their respective participation in the crime, the former entering a plea of guilty to the charge. Defendant, Culver, accordingly made a motion for a severance of his cause which was granted. The case proceeded to trial before a jury. After a lengthy trial, the jury returned a verdict finding defendant guilty of the offense charged, the court imposing sentence for a term of from not less than four (4) nor more than eight (8) years in the State Penitentiary.

Defendant brings his appeal from the trial court's denial of his post-trial motion for a new trial. It is his theory that the verdict was the product of passion and prejudice irreparably instilled by the repeated improper comments and tactics of the prosecuting attorney during the course of the trial. Defendant proposes that the record on appeal affirmatively demonstrates eight such instances. Responding, the State asserts that a review of the lower court proceedings fails to substantiate as prejudicial those events which defendant assigns as error.

Summarizing the facts, the occurrence in question concerns an armed robbery committed by three unmasked men at the above named jewelry store during the morning shopping hours of October 10,

1963. Baranowski and Foster were both apprehended within days of the offense and identified as two of the offenders, although it would appear that defendant was not taken into custody until approximately three months later.

Defendant was initially identified from photographs and again at the trial by three alleged State's eyewitnesses, the victim, Kosinski, as well as Robert Ervin and Police Officer Henry Kida, all of whom had been present in or in proximity to the store during the altercation. Kosinski testified that he observed the accused for about 10 to 15 seconds from a distance of 6 or 7 feet inside his establishment, while Ervin stated that he had witnessed defendant, from a considerable distance, outside loading boxes into an automobile (registered to Baranowski). Officer Kida's identification of the accused was predicated upon a two minute partial face to face confrontation at gunpoint, immediately inside the front door of the store, and proved to be the most convincing of the accounts. There is no dispute but that the area was well illuminated at the time.

Kida was able to select defendant from among photographs five days after the offense. He, along with Mr. Kosinski, similarly identified the accused at the police showup conducted some three months later, on January 21, 1964. Ervin identified Foster from a similar showup, but failed to so identify Baranowski. Defendant was not physically exhibited to him until the time of trial. Kida did not have occasion to identify Foster, and it would appear that Mrs. Kosinski, who was then present, could identify only Baranowski and Foster.

Testifying in his own behalf, defendant offered an alibi to establish his presence several miles from the scene during the critical hours of the date in question, which was corroborated in all material respects by the testimony of his brother, Robert Culver, and one George Gosly. The defense offered evidence to show that

defendant had taken breakfast in the company of these two and then journeyed together to the Alpine Motors, Inc., a car lot in Wilmette, owned by Gosly, to examine a 1958 Ford station wagon. Records and notations kept by Gosly demonstrated that such an automobile, in fact, was under his ownership at that time, and that Robert Culver had contacted his agency two months earlier in reference to a purchase.

The court, in reviewing the record, finds substantial factual basis to support two of the contentions of error advanced by defendant. As to the first, it is averred that the State, despite the repeated admonitions of the trial judge, and by calculated subversion of the court's order of severance, deliberately elicited testimony from the State's witnesses relative to certain out of court declarations of co-indictees Baranowski and Foster, implicating defendant as a fellow participant in the commission of the offense at bar. Neither Baranowski nor Foster had been called to testify by the State.

A foreboding of the course of conduct to be pursued by the prosecutor first manifested itself through the testimony of Roman Kosinski. It would appear, in retrospect, that the foundation as it were was laid at this point for the attestations of Police Detective Jerry Stubig to follow. By repetitious inquiry, the essence of Kosinski's testimony was to establish that defendant had been personally identified only <u>after</u> a point in time when Stubig had had occasion to converse in the witness' presence with the co-indictees, the connotation being that Baranowski and Foster had furnished information relative to the identity of the then absent and unknown third offender (the defendant). Similar questions designed to elicit the same answer were interjected at several junctures in Kosinski's testimony and the subject being again alluded to during the direct examination of Officer Kida.

While the State argues that this sequence of events was

elicited merely for corroborative purposes of the witnesses' identifications of defendant, certain occurrences as they later unfolded at trial leave no room for an innocent construction as to the motive for that line of inquiry. Following the preliminary questioning of Detective Stubig, a conference was conducted out of the presence of the jury wherein the prosecutor was cautioned by the court to confine his inquiries to matters affecting the identifications of the accused and to avoid any questions tending to elicit the substance of what Baranowski said to the witness. The prosecutor acquiesced in the ruling, but nonetheless thereafter directed the following questions to the detective:

> "Q. All right. Now prior to the arrest of Baranowski, did you know of one George Culver?"
> [Objection sustained]

* * *

Then, in reference to the October 15, 1963 lineup, wherein Baranowski had been identified by Kosinski and Kida, he inquired:

> "Q. Now, after the identification of Baranowski, did you have an occasion to have a conversation with Baranowski?"
> [Objection sustained; jury instructed to disregard question; motion for mistrial denied]

* * *

> "Q. When these witnesses were present, that you have told the ladies and gentlemen of the jury about, did Baranowski say anything for purposes of identification?
>
> A. Yes."
> [Objection sustained; motion for mistrial denied]

At the instance of the court, another conference in chambers was promptly conducted, the trial judge conveying to the prosecutor that he feared that testimony to show the existence of a conversation with Baranowski was being used as a prelude to hearsay testimony in regard to the subject of that conversation. In response, the prosecutor assured the court that he would not ask the witness what the co-indictee said. Thereupon, the prosecutor returned to the courtroom and had the above last preceding question

and answer re-read by the court stenographer in the presence of the jury. Defendant's objection to this was immediately sustained, and the comments were stricken and the jury instructed to disregard them.

Notwithstanding the expressed concern of the court, the prosecutor then during redirect examination of the witness altered his imminently hearsay approach to the same topic of interrogation, addressing the following inquiries to Stubig:

> "Q. All right. Did you have a conversation with the defendant Culver in reference to the defendant Baranowski?
>
> A. I did."
> [Objection overruled]
>
> "Q. Did you?
>
> A. I did.
>
> Q. And what did you tell the defendant Culver in reference to the defendant Baranowski, if anything?"
>
> * * *
>
> "A. I or one of my partners informed Mr. Culver that Donald Baranowski stated that he was one of the accomplices in the robbery, and that also a Mr. Foster stated that he was the other - - the third man in the robbery."
> [Objection overruled]

Lest the prosecutor's efforts be minimized, later in the proceedings during the cross-examination of defendant he posed the following question pregnant with his own testimonial assertion:

> "You heard the police testify that Baranowski said that you were one of the men that robbed Roman Kosinski. Were you there when he said that?"
> [Objection sustained; motion for mistrial denied]

Thereinafter, the prosecutor succeeded in compounding the prior errors when during closing argument, he stated to the jury:

> "You heard, when Detective Stubig took the stand, Foster and Baranowski, when they confessed, and it's all agreed, the defense counsel said in his opening statement they confessed, they confessed thoroughly, and when they confessed thoroughly, they put Culver right in. Foster said it was Culver with them and Baranowski said it was Culver. . . ."
> [Objection overruled; motion for mistrial denied]

Elementary principles of fairness denote the cognizable vice of these latter two testimonial assertions from the prosecutor, the measures taken by the lower court, having been inadequate to insulate the accused from their damaging consequences. The effect of his remarks to that end served in a dual capacity to both emphasize to the jury the truth of the out of court declarations of the co-indictees which were otherwise inadmissible; People v. Adams, 1 Ill.2d 446, 115 N.E.2d 774 (1953), and compound their impact by the self-assertions of the prosecutor upon a fact not properly in evidence. People v. Rothe, 358 Ill.52, 192 N.E. 777 (1934).

The State, endeavoring to distinguish the Rothe case, exposes itself as having to now espouse two mutually inconsistent and repugnant theories to sustain the prosecutor's actions. As to his self-assertions, it submits that such remarks were merely fair comment upon a fact already in evidence; i.e., that defendant was named as an accomplice by his confederates. This by our interpretation of the response elicited from Stubig is erroneous. To the contrary, those statements constituted a gross misrepresentation to the jury of what was alone and was in fact in evidence; i.e., that defendant was told that he had been implicated by Baranowski and Foster, such being operative only as proof of the fact that the accused had been so informed, and not establishing to any efficacious degree the truth of what the co-indictees said to the detective. This, we feel, by itself, was prejudicial to defendant's case.

As to defendant's attack upon the hearsay aspects of that same conversation testimony, the State, advocating the primary or first-hand nature of Stubig's account, completes the dichotomy of its argument. Contrary to its previous position, the State now maintains that no hearsay objection can appropriately obtain to that testimony inasmuch as the detective testified only

to the substance of what he had personally related to the accused, in reference to statements given to him by the co-indictees. The State submits accordingly that whether or not defendant was physically present when the co-indictees uttered their remarks is hence of no import. Under the facts of the instant case, we deem these propositions inadequate to overcome the safeguards implicit in the hearsay barrier.

Defendant's hearsay objections to the detective's account should have been sustained for three manifest reasons. First, it would appear that the trial judge was swayed into permitting the testimony for the reason that the defense had injected the substance of that conversation into issue previously during the cross-examination of Stubig. An analysis of that theory however discloses the court's conclusion to be factually unsupported by the record.

The only conversation to which counsel for defendant alluded during that cross-examination pertained to an alleged spontaneous utterance by the defendant declaring his innocence upon being selected from the lineup by Kosinski and Kida. The conversation to which Stubig was permitted to refer on redirect-examination is vividly revealed by his own admissions as having been both dissimilar as to subject matter and removed in point of time. The later conversation took place some five minutes subsequent to the accused's statement, was possibly conducted in another room in the police headquarters building and occurred only after the remaining members of the lineup had been dismissed. Moreover, Stubig conceded that he had not remained in defendant's presence during the entire intervening time period.

Secondly, notwithstanding the immediacy of the detective's attestations of a conversation with the accused, the State cannot be heard to avoid the pretentious assertions contained therein as it finds application to the rule against hearsay testimony. While

we have held that under appropriate circumstances the contents of an out of court conversation can be properly admitted to demonstrate that the statements induced the conduct of the witness testifying; People v. Luna, 69 Ill.App.2d 291, 216 N.E.2d 473 (1966), revd. oth. grds., 37 Ill.2d 299 (1967), here a somewhat anomalous situation obtains.

That to which we refer is possibly best described by the statements of the court in People v. Carpenter, 28 Ill.2d 116 (121), 190 N.E.2d 738 (1963) where, in discussing the purpose served by the hearsay rule, it was noted:

> ". . . the essential feature, without which testimonial offerings must be rejected, is the opportunity for cross-examination of the party whose assertions are offered to prove the truth of the act asserted. . . .
> The distinction between admissible testimony and that which is barred by the hearsay rule is well illustrated by Wigmore's example of the witness A testifying that 'B told me that event X occurred.' If A's testimony is offered for the purpose of establishing that B said this, it is clearly admissible - if offered to prove that event X occurred, it is clearly inadmissible, for the only probative value rests in B's knowledge - and B is not present to be cross-examined."

Indeed, the latter example by Wigmore bears directly upon and resolves the issue before us. Suffice only to say, the attempts of the prosecutor to introduce the substance of the co-indictees' statements, as they are replete in the record, leaves no room for speculation but that Stubig's assailed testimony was propounded, not to establish the fact of a conversation with the accused, rather for the sole purpose of offering as the truth of the matter the out of court inculpatory assertions of co-indictees Baranowski and Foster. To this extent, it was hearsay and prejudicial to defendant.

Thirdly, the State has evidently misunderstood the purpose to be served by the original grant of severance to defendant. It is equally evident that Stubig's account as to this conversation, coupled with prior related testimony, operated to thwart the protection intended the accused, thereby accomplishing by indirection

that which the trial judge had expressly prohibited by direct means.

The underlying rationale for the entry of an order of severance is to insulate the moving defendant from any of the incriminating or implicating admissions or confessions of his co-defendants. People v. Clark, 17 Ill.2d 486, 162 N.E.2d 413 (1959). From within that framework, the admissions or confessions of codefendants are inadmissible, and incompetent evidence against the accused, unless first shown by the State to have been made in his physical presence and assented to by him. People v. Tunstall, 17 Ill.2d 160, 161 N.E.2d 300 (1959). Such requisite elements are totally absent from the proofs of the instant case. Here, the objectionable portion of Stubig's testimony, particularly when linked to the assertions of the prosecutor, bore directly upon the ultimate issue of guilt or innocence, and was likely to have a profound effect upon the jury. The entire procedure was to emphatically convey that the co-indictees named defendant, which error we cannot dismiss as only effecting evidence otherwise cumulative in nature. Defendant, in essence, was denied the right to be confronted by the persons testifying, in absentia, against him. People v. Maggio, 324 Ill.516, 155 N.E.373 (1927).

Lastly, a second element of prejudicial error emanated from certain accusations of the prosecutor directed at alibi witness, Robert Culver, during cross-examination which implied that the witness had been involved in prior criminal misconduct. It having been established that the witness and Gosly had been associated in 1950 in an automobile agency known as Franklin Motors, the prosecutor stated:

> "Q. Do I look familiar to you."
> [Objection sustained; jury instructed to disregard question]
>
> "Q. Franklin Motors, with yourself and Gosly - - do you know what selling out of trust means?
>
> A. Yes, sir, I do.

Q. You people, at that time, were selling Cadillacs that you didn't own, is that correct?

A. I did not, sir."
[Motion for mistrial]

Thereupon, a conference in chambers was had wherein the court asked if the State could establish that the witness had been convicted of a felony, the prosecutor replying, "Of course not." Asked then if the witness had been arrested in this regard, the prosecutor answered, "No, he got out of it. We couldn't prove it against him." Defendant's motion for a mistrial was denied, the court however admonishing the prosecutor that he was again approaching grounds for a mistrial. In closing argument, the prosecutor seized upon the occasion to make further disparaging comment as to the credibility of Robert Culver, stating:

> "Well, we can all use our reason and know those type of persons that go in and out of business, back into business, maybe it's legitimate, maybe it's not - -."
> [Motion for mistrial denied]

The State cannot, without doing violence to defendant's defense and committing reversible error, seek to cross-examine an alibi witness with regard to other than convictions for infamous crimes or otherwise infer he maintains a predisposition to criminal activity. People v. Smith, 74 Ill.App.2d 458, 221 N.E.2d 68 (1966).

While the evidence adduced below demonstrated that three persons succeeded in identifying defendant as one of the perpetrators of the robbery, his guilt or innocence was not a matter to be determined in other than a fair and unobstructed proceeding. No quantum of evidence, in our minds, justifies a departure from the application of established rules of evidence, nor authorizes the actions taken here. Accordingly, defendant is entitled to a new trial.

For the above reasons, the judgment is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

BURKE, P.J., and MC NAMARA, J., concur.

67-3

96IA2-343

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord one thousand nine hundred and sixty-eight, within and for the Third District of Illinois:

Present—

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE A. J. SCHEINEMAN

J. LINDO SILVER, Clerk

FLOYD L. CONKLING, Sheriff

BE IT REMEMBERED, that afterwards on JULY 8, 1968 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

No. 67-3

In The

APPELLATE COURT OF ILLINOIS

Third District

Abstract

A. D. 1968.

EDWARD WISNIEWSKI, Plaintiff-Appellee, vs. DELBERT W. JOHNSON, Defendant-Appellant.	)	Appeal from the Circuit Court of Will County Honorable John C. Lang, Magistrate Presiding.

ALLOY, P. J.

This is an appeal from a judgment of the Circuit Court of Will County in favor of Edward Wisniewski as plaintiff and as against Delbert W. Johnson as defendant in the sum of $2,200 and also dismissing a counterclaim filed by said defendant against the plaintiff. The action was instituted by plaintiff for recovery of moneys paid by plaintiff to defendant for purchase of defendant's employment agency. The complaint for refund alleged a right to a refund thereof by reason of a provision in written contracts between the parties excusing performance by plaintiff in the event he could not obtain a license from the State of Illinois to operate an employment agency. Defendant counterclaimed for the balance of money allegedly due him under said contracts for purchase of the agency. The cause was tried in the Will County Magistrates Division without a jury.

The record discloses that the plaintiff Edward Wisniewski entered into an agreement to purchase an employment agency from defendant Delbert W. Johnson. Two contracts were actually entered into. The second contract, on August 26, 1961, provided for the sale of the agency with the accounts receivable for a total sum of $4,400. The employment agency had been operated by defendant, Delbert W. Johnson, for a period of seven years. Immediately following the execution of the second contract referred to, the prospective buyer, Edward Wisniewski, took possession of the agency. The seller moved to another city. After approximately 2-1/2 weeks in possession of the agency, the buyer returned the keys to the seller together with a letter stating that he would no longer recognize the contract. This letter was excluded from evidence by the trial court upon objection by attorney for plaintiff. No error was assigned by defendant by reason of the exclusion of such letter from evidence. Nothing was done by the seller as a result of the presumptive repudiation of the contract after the period of 2-1/2 weeks when the keys were returned to the seller. Approximately five months thereafter on February 21, 1962, the buyer received a letter from the State of Illinois authorities informing him that his license had been denied him. The buyer, plaintiff, thereafter instituted the present action to recover the money he had paid under the contract, and the seller counterclaimed for the balance of the money he claimed due under the contract. On trial of the cause, the court below found for the plaintiff and entered judgment as against the seller, Delbert W. Johnson, for return of the $2,200 which the buyer had paid under the contract and likewise dismissed the counterclaim filed by defendant as against plaintiff. The court also directed return of the accounts receivable to defendant and payment of all earnings, received by plaintiff from such business operation, to defendant.

On appeal in this Court, seller contends that the buyer was guilty of an anticipatory breach of the contract when he repudiated the executory contract before the time for performance had been completed, and that the seller had the right to treat the contract as ended or defend any action by plaintiff on the ground of anticipatory breach by plaintiff. In the state of the record, however, the letter which seller contends was the basis for the anticipatory breach was excluded from evidence and, thus, the record before us contains no evidence of an anticipatory breach. There is no showing by seller on the appeal in this Court that the letter disclosing the anticipatory breach should have been admitted into evidence. Seller, however, in his brief asserts contentions to the same effect as if the letter were in fact in evidence. In the state of the record since no error is assigned as to the exclusion of the letter as evidence, we cannot consider such question on appeal (LEWIS v. KING, 180 Ill. 259).

Under the record, the only issue which is before us is whether there is sufficient evidence in the record to sustain the finding of the trial judge that the buyer had a lawful basis for failing to complete the contract and whether he was accordingly entitled to a refund of the purchase price paid to the defendant. The contract provided that the conveyance was conditioned on plaintiff's being able to obtain a license to operate an employment agency. The record disclosed that plaintiff had been denied a license by the State of Illinois and that this was a condition subsequent justifying termination of the buyer's liability under the contract. There was no showing in the record that the buyer-plaintiff did not make a reasonable attempt to obtain the license. On the contrary, so far as the record discloses, there was affirmative evidence that plaintiff had filled out all the forms which were required and that his application for license was nevertheless denied.

Under the record in this cause we must, therefore, affirm the judgment entered in the trial court. The judgment of the Circuit Court of Will County will, therefore, be affirmed.

Affirmed.

Scheineman, J. concurs.

Stouder, J. dissents.

STATE OF ILLINOIS,
APPELLATE COURT, } ss.
THIRD DISTRICT,

I, JOHN E. HALL, Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of September, in the year of our Lord one thousand nine hundred and ~~sixty~~ Seventy.

John E. Hall

Clerk of the Appellate Court.

NO. 67-59

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, EX REL THE DEPARTMENT OF PUBLIC HEALTH, STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of St. Clair County.
vs.	)	
BUD BROWN, ET AL,	)	Honorable Alvin H. Maeys, Jr., Judge Presiding.
Defendants-Appellants.	)	

Goldenhersh, J.

Defendants appeal from the order of the Circuit Court of St. Clair County denying their Motion to Quash Service and Dismiss. In the motion defendants state that their appearance is limited as provided by section 20 of the Civil Practice Act (Ch. 110 sec. 20, Ill. Rev. Stat.); that the individual who served the summons on the defendant, Bud Brown, was not qualified to do so under the provisions of section 13.1 of the Civil Practice Act; that the "matter and questions involved here" are the subject of litigation pending on appeal before the Supreme Court of Illinois. Although the other matters contained in the motion appear to apply to all of the defendants, only the service on defendant, Bud Brown, is specifically attacked.

Plaintiff contends that the order denying the motion is not a final appealable order and the appeal should be dismissed.

Except as provided in Supreme Court Rules 304, 306, 307, and 308 only final orders and judgments are appealable.

In The Village of Niles v. Szczesny, 13 Ill. 2d 45, the Supreme Court, at page 48, said: "To be final and appealable, a judgment

or order must terminate the litigation between the parties on the merits of the cause, so that, if affirmed, the trial court has only to proceed with the execution of the judgment. (Citing cases) While the order need not dispose of all the issues presented by the pleadings, it must be final in the sense that it disposes of the rights of the parties, either upon the entire controversy or upon some definite and separate part thereof. (Citing cases)"

Section 20 of the Civil Practice Act provides in part:

> "(1) Prior to filing any other pleading or motion, a special appearance may be made either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person of the defendant. A special appearance may be made as to an entire proceeding or as to any cause of action involved therein....."
>
> "(3) .....Error in ruling against the defendant on the objection is waived by the defendant's taking part in further proceedings in the case, unless the objection is on the ground that the defendant is not amenable to process issued by a court of this State."

Neither the statute itself, nor any authority brought to our attention, confers upon an order denying a motion based on section 20 the attributes of a final order or judgment.

For the reasons stated the appeal is dismissed.

Appeal dismissed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and sixty-seven, within and for the Second District of Illinois:

Present -- Honorable MEL ABRAHAMSON, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable CHARLES H. DAVIS, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On JUN 24 1968 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 67 63

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

STEPHEN P. MAY, by CATHERINE A. MAY, his mother, next friend, and guardian,	)	
Plaintiff-Appellee,	)	
v.	)	Appeal from the Circuit Court of
SEARS, ROEBUCK AND CO.,	)	the 18th Judicial Circuit, DuPage
Defendant-Appellant.	)	County

MR. PRESIDING JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from the order of the Circuit Court of DuPage County which found that certain of the denials of the answer of the defendant were untrue, made without reasonable cause and in bad faith, and which assessed attorney's fees and costs in the amount of $3,350.90.

The amended complaint against Sears alleged a cause of action based on negligence in Court III, and on strict liability in tort in Count IV. More than 20 acts of negligence were charged against Sears in Count III, among which were those set out in paragraph 3:

> "(1) Carelessly and negligently designed, manufactured or sold a lawn mower which failed to comply with one or more of the following minimum safety standards adhered to by the rotary lawn mower industry at that time:

(1) Failed to meet the minimum safety standards for blade position.
(2) Failed to meet the minimum safety standards for blade enclosure.
(3) Failed to meet the minimum safety standards for blade exposure.
(4) Failed to meet the minimum safety standards for warning signs."

The defendant, Sears, denied these allegations and further denied that it was guilty of any negligence whatsoever. Subsequently, defendant learned through answers to interrogatories that the "minimum safety standards" referred to by the plaintiff's Amended Complaint were alleged to be the 1960 A. S. A. Safety Specifications for Power Lawn Mowers. The defendant offered evidence that the mower complied with industry practice.

After the specifications were admitted, the plaintiff offered evidence that the mower did not comply with them in that the angle of discharge at the front was greater than specified; defendant offered evidence that any noncompliance in this regard would have made little difference as far as throwing objects was concerned.

The plaintiff did not move for a directed verdict at the close of all of the evidence. However, he did ask that the jury be instructed that failure to comply with the standards may be considered together with all other facts and circumstances in determining whether the defendant was negligent. This instruction was given and the jury returned a verdict against Sears for $28,000.00.

During the course of trial, the plaintiff had settled with the owner and operator of the mower for $3,000.00. Sears moved for a reduction of the judgment in that amount. The plaintiff filed a motion under Section 41 of the Civil Practice Act (ch. 110, sec. 41, Ill. Rev. Stat.) for expenses and attorneys' fees on the ground that Sears'

denial of negligence in failing to comply with the "minimum safety standards adhered to by the rotary lawn mower industry at that time" was untrue, made without reasonable cause and not in good faith. However, the plaintiff's attorney subsequently conceded it was proper for the defendant to deny it had been negligent or careless in this regard.

The Court, pursuant to Sears' motion, reduced the judgment on the plaintiff's verdict by $3,000.00, but at the same time entered another order awarding the plaintiff $3,350.90 on the plaintiff's motion for expenses and attorneys' fees. This appeal is from the order awarding the plaintiff fees and expenses.

No appeal has been taken from the jury's verdict and judgment thereon in favor of the plaintiff. No question is raised concerning reasonableness as to the amount of attorneys' fees and costs awarded. Only the propriety of the trial court's order under Section 41 of the Civil Practice Act is involved in this appeal.

In Lipscomb v. Coppage, 44 Ill. App. 2d 430, defendant admitted that plaintiff's decedent had been shot in a tavern fight and admitted that he had died, but denied that death occurred as a result of the shooting. From the evidence it was obvious that death could only have occurred as a result of the shooting. In Year Investments, Inc , v. Joyce, 44 Ill. App. 2d 367 (published in abstract only), plaintiff claimed that defendants defrauded him of certain realty in dating, sealing, acknowledging and recording an incomplete deed. Defendants denied that they had purchased a bogus seal and dated, sealed, acknowledged and recorded the deed. All of this was proved at the trial and the Court held that such denial was made in bad faith. In Brooks v. Goins, 81 Ill. App. 2d 12, the defendant denied a certain insurance policy was in

existence and denied that summons had been served upon him. The proof was that such insurance policy had been issued and that summons had been served. In each of these cases the denial was a denial of a physical fact rather than a denial that certain conduct did not constitute negligence.

In the case before us the evidence is that the standards of safety were first published in 1960, but that the mower in question had been designed in 1959. There is some conflict as to exactly when the defendant learned of the existence of the A. S. A. Safety Specifications. It is not clear from the record that these specifications had in fact been adopted as the minimum safety standards by the industry at the time of the sale of the mower involved herein.

In Dean v. Kirkland, 301 Ill. App. 495 at page 509, the Court said:

> "It must be assumed that attorneys in filing pleadings, have due regard for their duties and responsibilities as officers of the court. Attorneys in filing pleadings are permitted to exercise a broad discretion, based on honest judgment, from the facts presentedto them."

The burden was on the plaintiff, not only to prove that denial was untrue, but as the Court said in Horween v. Dubner, 68 Ill. App. 2d 309, pages 319 and 320:

> "The burden of proof was on the plaintiffs to show that the statements were made without reasonable cause and not in good faith. Defendants did not have to present any evidence as to whether or not they acted with reasonable cause and in good faith, until plaintiffs sustained their burden of proof. Plaintiffs had to present sufficient evidence that the allegations in defendants' pleadings were not only untrue, but that defendants, at the time that they made the allegations, knew they were untrue."

The mere fact the jury rendered the verdict against the defendants does not satisfy the plaintiff's burden. Adams v. Silfen, 342 Ill. App. 415, 421.

From our review of the record it does not support the trial court's determination that the defendant acted in violation of Section 41 of the Civil Practice Act.

JUDGMENT REVERSED.

DAVIS, J. and MORAN, J. concur.

File 67-80

96 I A 2-363

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord one thousand nine hundred and sixty-eight, within and for the Third District of Illinois:

Present—

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE A. J. SCHEINEMAN

J. LINDO SILVER, Clerk

FLOYD L. CONKLING, Sheriff

BE IT REMEMBERED, that afterwards on JUNE 28, 1968 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

No. 67-80

In The

APPELLATE COURT OF ILLINOIS

Third District

Abstract

TILLMAN GOLDEN, Plaintiff-Appellee, vs. RAYMOND JOSEPH, d/b/a 901 CLUB, Defendant-Appellant	Appeal from the Circuit Court, Peoria County. Honorable C. W. Wilson, Judge Presiding

SCHEINEMAN, J.

The plaintiff sued the defendant for injuries he received in exiting from defendant's tavern, alleging negligence in the maintenance and lighting of a step at the place of exit. The jury's verdict was for plaintiff and judgment was entered thereon. On this appeal it is contended the plaintiff failed to prove negligence, proximate cause, or freedom from contributory negligence.

The occurence was after 5:00 P. M. on a February day. Plaintiff had been in the same tavern in the morning when it first opened. He purchased a six-pack of beer and a half pint of whiskey. Of this, he said he drank 1½ ounces of whiskey and three beers, while a friend was drinking with him. In the afternoon he came in again for another six-pack. He testified four people were drinking this and he had only one beer. Later he stopped at another tavern for one beer, then

returned to defendant's place.

On this occasion the bartender refused to serve him and ordered him to leave. He asserted the plaintiff was drunk and when he did not go when told, the bartender came from behind the bar and advanced toward plaintiff with hands outstretched. From this point the evidence becomes highly conflicting.

Plaintiff testified that, as the bartender hurried him out the door, he fell on the step, striking his hip on the edge, which fractured the bone, resulting in more than a month in a hospital. He claims he was lying partly on the step and rolled off to lie flat on the sidewalk. He was then carried or dragged to a utility pole and placed sitting against it. He saw the bartender coming out the door with him but did not see him when he was moved, although he heard his voice. Later he was taken away in the ambulance. He considered that he had been forcibly ejected. When asked a question involving his leaving the tavern, he interrupted to say he did not leave it. He asserted that he was not drunk, he knew what he was doing; the effect of what he had consumed earlier had worn off.

Two photographs in evidence depict this entrance and the step. The step merely extends the floor level a few inches beyond the door and it then has a level about 8 inches above the sidewalk. The picture shows a crack or groove in the step for its full width. The defendant testified it is not a crack, it is a groove caused by extending the step during remodeling, to conform it to the remodeled building.

The only lighting of this entrance consists of beer signs, there being an electric sign in the window on each side of the door and another outside, over the doorway. The latter is perpendicular and projects at right angles from the building. Its light would be visible from right or left of the door, but it does not appear to be arranged to shed any light on the step. The occurence being in the later afternoon in the winter the plaintiff testified to "very poor light."

The bartender testified that the tavern is well lighted, that it was turning dark outside, that he did not go outside with the plaintiff but, when the latter beat on the windows, he opened the door, ordered him away and shook his fist at him. As plaintiff was departing he fell while four or five feet from the utility pole located 20 to 25 feet from the step. The plaintiff said he was hurt and did not want to be helped to his feet. He sat down propped against the pole. The bartender denies that he placed him there.

A man coming out of a nearby grocery saw plaintiff fall when four or five feet from the pole. The bartender was several feet from him at that time. This witness said it was still daylight.

A customer in the tavern saw the bartender go out after the plaintiff banged on the window. He did not see the plaintiff fall but he saw the bartender go out and, looking through the door, he saw the bartender was then halfway to the plaintiff who was then lying on the sidewalk 4 or 5 feet beyond the utility pole. This witness said it was light outside but the tavern was rather dark, darker than his home.

The owner did not go outside but tells of the bartender going out after the plaintiff beat on the window. It was then dark outside, or dusk turning dark. The time was between 5:30 and 6:00 P. M., closer to 5:30 than to 6:00.

After the defense rested, a woman was called by the plaintiff to testify in rebuttal. The defense protested at some length but the presiding judge overruled the objection, permitted this woman to testify, and limited the cross-examination to the scope of the direct except for impeachment purposes. Both rulings are assigned as errors in this appeal. She contradicted the defense testimony in some respects, but in some others she contradicted the plaintiff.

She testified that, as she approached this entrance, she saw the plaintiff and the bartender come out at the same time, that plaintiff was drunk, and staggering and the bartender was partially holding him up and helping him along. She saw the plaintiff fall when near the utility pole. She said the bartender then pulled him up and sat him against the pole.

The complaint charged that the step was in disrepair and poorly lighted. Plaintiff has the burden of proving the conditions, or some of them, as claimed, and that this was negligence and the proximate cause of his injury. KUNZ v. LARSON, 15 Ill. App. 2d 126, Intoxication may be put in evidence and may indicate inability to use reasonable care. PATAROZZI v. PRAIRIE STATES OIL & GREASE CO., 71 Ill. App. 2d 155.

On the other hand the defendant had a duty to use due care to protect invitees. BLUE v. ST. CLAIR COUNTRY CLUB, 7 Ill. 2d 359. This duty extends to means of access and egress. COOLEY v. MOLLY MAKSE, 46 Ill. App. 2d 25. Where there is a difference in floor level, the place should be sufficiently lighted to enable users to see the step. POLLARD v. BROADWAY CENTRAL HOTEL CORP., 353 Ill. 312.

In the face of the conflicting evidence it is difficult for this court to conceive what really happened. Of course, the jury could accept and reject testimony according to their notions of what was reasonable and credible, and could draw inferences based thereon.

They may have believed the plaintiff' s assertion that he was not intoxicated and that plaintiff did lose his balance either because of the condition of the step or his inability to judge the extend of the stepoff in the dim light, or both. Regardless of the place of his fall, they may have believed he lost his balance at the step because of the conditions, and only took some paces from there because he was held by the bartender. As to the testimony of the rebuttal witness that plaintiff was staggering the jury may have believed this was caused by his loss of balance at the step rather than from intoxication.

This court cannot weigh the evidence and the reasonable inferences therefrom to find contributory negligence. PREE v. HYMBAUGH, 23 Ill. App. 2d 211, 162 N. E. 2d 297. Nor must we substitute our judgment for that of the jury as to the weight and credibility of the conflicting testimony. DeLEGGE v. KARLSEN, 17 Ill. App. 2d 69, 149 N. E. 2d 491. Where credible

evidence supports the verdict the reviewing court is deterred from deciding that other conclusions are more reasonable than that drawn by the jury. McCOTTRELL v. BENSON, 32 Ill. App. 2d 367, 178 N. E. 2d 143.

This court holds that there was evidence in support of the complaint which the jury could believe, and justified their verdict.

The instructions were not abstracted. We assume the jury was properly instructed as to the issues and burden of proof, including the requirements we have specified, yet they found for the plaintiff. The trial judge also saw and heard the witnesses and heard the closing arguments. His denial of post trial motions indicates he deemed the parties had a fair trial, that there was evidence which, if believed, supported the verdict, and that the closing arguments did not exceed the bounds of propriety. His opinion has the due respect of this court. The allowance of a rebuttal witness was within his discretion and in our opinion the testimony was rebuttal. Finding no error, the judgment is affirmed.

Affirmed.

Stouder, J., Alloy J. concur

STATE OF ILLINOIS,
APPELLATE COURT, } ss.
THIRD DISTRICT,

I, JOHN E. HALL, Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of September, in the year of our Lord one thousand nine hundred and ~~sixty~~ Seventy.

John E. Hall

Clerk of the Appellate Court.

96 IA 2d 372

NO. 67-113

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JAMES I. MALONE, Defendant-Appellant.	)	Appeal from the Circuit Court of Fayette County. Honorable Franklin R. Dove, Judge Presiding.

Goldenhersh, J.

Defendant was tried by jury in the Circuit Court of Fayette County, convicted of the offense of Attempt (Ch. 38, sec. 8-4(a), Ill. Rev. Stat. 1967), and sentenced to the Illinois State Penitentiary for a term of not less than 3 nor more than 4 years. The information charges that he attempted to escape from the Illinois State Farm at Vandalia.

Defendant contends that the trial court erred in refusing to give his instructions Nos. 5 and 6, and the punishment imposed is excess

Defendant's instruction No. 5, tendered and refused, in substance, states, (a) the defendant is presumed to be innocent, (b) in order to convict the defendant, every material fact necessary to constitute the offense charged must be proven beyond a reasonable doubt, (c) and if the jury entertain any reasonable doubt upon any single fact or element necessary to constitute the crime charged, the defendant must be acquitted.

The People's instructions adequately define the offense of Attempt and instruct the jury with respect to what they must find, beyond a reasonable doubt, in order to convict the defendant.

Defendant's instruction No. 2 informs the jury of the presumption of innocence.

The only portion of defendant's tendered instruction No. 5 which is not specifically covered in other instructions, is the portion which states that if the jury entertain a reasonable doubt upon any single fact or element necessary to constitute the crime charged, the defendant must be acquitted.

Although the People's instructions do set forth what the jury must find, beyond a reasonable doubt, in order to convict, an instruction to the effect that failure to so find on any of the enumerated elements must result in acquittal is, in our opinion, proper, and should be given. The concluding paragraph of I.P.I. 21.02 suggests an appropriate form of such an instruction.

In the People v. Rife, 382 Ill. 588, at page 602, the Supreme Court said, "Neither the State nor the defense is entitled to a repetition of instructions, and to restate a proposition of law in different language is but a repetition. (People v. White, 308 Ill. 210.) It is not error to refuse the giving of an instruction where another instruction given has substantially covered the points in the refused instruction."

In The People v. Banks, 7 Ill. 2d 119, at page 129, the Supreme Court said, "To require absolute and technical accuracy in instructions would, as a general rule, defeat the ends of justice and bring the administration of the criminal law into disrepute and contempt. It is sufficient when instructions, considered as a whole, substantially and fairly present the law of the case to the jury."

There is no dispute in the evidence that defendant climbed upon, and either fell or jumped off the fence over which it is charged he

attempted to escape. Defendant's instruction No. 4 specifically instructs the jury that intent is one of the elements which must be proved beyond a reasonable doubt, and as previously stated, the People's instructions correctly enumerate the elements of the offense and advise the jury that these elements must be proved beyond a reasonable doubt.

From our review of all of the instructions we hold that the refusal of defendant's instruction No. 5 was not error which requires reversal.

Defendant's instruction No. 6, reads as follows:

> "The Court instructs the jury that mere probabilities are not sufficient to warrant a conviction; nor is it sufficient that the weight or preponderance of the evidence supports the allegations of the indictment; nor is it sufficient upon the doctrine of chances that it is more probable that the defendant is guilty than innocent. To warrant a conviction of the defendant he must be proven to be guilty so clearly and conclusively that there is no reasonable theory based upon the evidence in the case upon which he can be innocent when all the evidence in the case upon which he can be innocent when all the evidence in the case is considered together, and if the prosecution has failed to make such proof the jury should find the defendant not guilty."

This instruction is properly given when the People's evidence is entirely circumstantial, and the trial court did not err in refusing to give it.

We have reviewed the evidence in aggravation and mitigation, and find no reason to reduce the sentence imposed.

The court expresses its thanks to appointed counsel for a comprehensive brief and a most helpful oral argument.

The judgment of the Circuit Court of Fayette County is affirmed.

Judgment Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

96 IA 382

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and sixty-seven, within and for the Second District of Illinois:

Present -- Honorable MEL ABRAHAMSON, Presiding Justice
Honorable CHARLES H. DAVIS, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On JUN 28 1968 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

67 160

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal from the Circuit
	)	Court for the Sixteenth
WILLIAM QUINN,	)	Judicial Circuit, Kane
	)	County, Illinois
Defendant-Appellant.	)	

PRESIDING JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from the Circuit Court of Kane County. The defendant was found guilty by a jury of having committed aggravated battery and was acquitted of a charge of robbery. He was sentenced from one to five years in the State Penitentiary.

The defendant contends that there was no proof that he committed any act of such a serious nature as to sustain a conviction for aggravated battery; that there was no proof that he was the principal; and, that since his co-defendants were found not guilty, he could not be convicted as being an accessory.

On August 17, 1966, in the early hours of the morning, defendant and three associates pulled out of a gas station at a high rate of speed and proceeded in an easterly direction on Route 64 within the limits of the City of St. Charles in Kane County. A passing squad car took pursuit and eventually curbed the defendant and his

companions. It appears that the defendant, William Quinn, after stopping his car, got out and started walking back toward the squad car. Joseph Arballo, the assaulted officer, stated he left his car and started to approach the defendant. At least two of Quinn's companions got out of the automobile and approached the officer also. The evidence shows that Quinn, without provocation, struck the officer in the face with his fist. His companions grabbed the officer and one of them stole his gun. At some point Quinn or one of his companions struck the officer on the back of the head with a bottle, inflicting a severe head wound. The officer also suffered other physical injuries from the beating he received.

It is the defendant's theory that since his companions who took part in the assault upon the police officer were found not guilty and the State failed to prove which one of the defendants actually struck the officer on the head with the bottle, that the principal was acquitted and therefore the conviction of the alleged accessory must be reversed. No one knows who struck the officer on the head with the bottle. The evidence is clear that defendant initiated the physical attack upon the officer.

The Criminal Code of 1961 abolished the distinction between principal and accessory but does fairly clearly define when accountability exists. In Section 5-2, Chapter 38, Ill. Rev. Stat. (1967) it is provided that a person is legally accountable for the conduct of another when either before or during the commission of an offense he solicits, aids, abets, agrees or attempts to aid such other person in the commission of the offense.

From the record before us it seems clear that Quinn

started the battery upon the police officer and that the joining in of his companions in that battery aided and abetted his actions. Quinn set in motion a set of circumstances which ultimately caused the police officer to be brutally beaten and struck on the head. That the other parties in the assault were acquitted is not grounds to relieve Quinn of his responsibility. Chapter 38, Section 5-3, specifically covers the situation and provides that where an offense has been committed a person legally accountable, as we believe Quinn to be, may be convicted even though the other person claimed to have committed the offense has been acquitted.

Turning to the second contention of defendant that the offense did not constitute an aggravated battery, we find that his ases are not in point and assuming, arguendo, that the battery upon the officer did not cause great bodily harm, we find from the record that the battery was committed by Quinn upon a police officer in uniform and in the discharge of his official duties. Under the provisions of Chapter 38, Section 12-4 (b), paragraph 6, any battery however slight would constitute aggravated battery. Having examined the record with particular reference to the injuries suffered by the police officer, we are of the opinion that the conviction of Quinn for having committed aggravated battery should also be sustained on the grounds that he and his companions inflicted "great bodily harm" upon the officer. People v. Cavanaugh, 14 Ill. App. 2d 573; aff'd 13 Ill. 2d 491.

It is our opinion that defendant, William Quinn, was properly convicted of having committed the crime of aggravated battery.

JUDGMENT AFFIRMED.

DAVIS, J. and SEIDENFELD, J. concur.